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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 340

ETIENNE DUGAS

versus

AMERICAN SURETY COMPANY OF NEW YORK.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF ON BEHALF OF AMERICAN SURETY COMPANY OF NEW YORK, RESPONDENT.

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New Orleans,
January 9, 1937.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O. La.

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ORIGINAL BRIEF ON BEHALF OF AMERICAN SURETY COMPANY OF NEW YORK, RESPONDENT.

STATEMENT OF CASE.

The basic question herein presented is whether a surety on an appeal bond can be held liable after a judicial determination, by a court of competent jurisdiction, that the principal on the bond has discharged its full duty to the appellee and owes no more to him. The petitioner herein contends that the answer to this question should be "yes", whereas it is our contention, supported by the judgment

of the district court and that of the United States Circuit Court of Appeals, that the answer should be "no".

An approach to this matter will be facilitated by a chronological statement of the facts, which we shall make as briefly as possible:

On February 12, 1930, the American Surety Company of New York (hereinafter refered to as American), the respondent herein, executed, as surety, a bond for Lumbermen's Reciprocal Association, a Texas insurance company, as principal, in the penal sum of Twenty Thousand Dollars ($20,000.00); said bond being given in order to qualify the insurance company to do business in the State of Louisiana, as required by *Louisiana Act No. 172 of 1908*. A copy of the bond will be found at page . . . of the record. While not an issue in the case, we append in the margin hereof a copy of Act 172 of 1908.* Etienne

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*"ACT NO. 172
AN ACT

Requiring fire, life, accident and other kinds of insurance companies, other than surety and fidelity and fraternal societies, and insurance companies insuring against the breakage of plate glass only organized under the laws of other States, to give a bond payable to the State Treasurer conditioned for the prompt payment of claims arising in this State, and providing penalties for the enforcement of this Act.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That all fire, life, accident and other kinds of insurance companies other than fidelity and surety and fraternal societies and insurance companies in-

Dugas, petitioner herein, worked in Louisiana for an employer carrying a workmen's compensation policy with the Lumbermen's Reciprocal Association. Dugas was hurt in an accident; and, the Lumbermen's Reciprocal Association having gotten into financial difficulties, Dugas brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against the American on its qualifying bond (No. 188,642 of the docket of that Court). In said suit he obtained judgment, on April 14, 1931, for compensation at the rate of Twenty Dollars ($20.00) per week, for a period not to exceed three hundred (300) weeks (R. p. 14). From such judgment the American appealed suspensively to the Court of Appeal for the Parish of Orleans and furnished appeal bond in the sum of Ten Thou-

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suring against the breakage of plate glass only organized under the laws of other States, in addition to requirements now prescribed by law, shall, annually give a bond in favor of the State of Louisiana, with at least three good and sufficient sureties, resident of this State, and approved by the State Treasurer, in the full sum of Twenty thousand dollars ($20,000.00), or a bond of a surety company authorized to do business in this State, conditioned for the prompt payment of all claims arising and accuring to any person during the term of said bond by virtue of any policy issued by any such corporation upon the life or person of any citizen of this State, or upon any property situated in this State, and such bond shall be annually renewed, and the old bond will become cancelled by the acceptance of the new bond by the State Treasurer, such acceptance being full authority to the Clerk of Court where the old bond is recorded to make such cancellation on his records. Provided

sand Dollars ($10,000.00) executed by New York Casualty Company as surety (R. p. 16). The said appeal was perfected and the record filed in the said Court of Appeal, but nothing further was done therein for the reasons hereinafter stated. Thereafter, on June 5th, 1931, the American filed its bill of interpleader in the United States District Court for the Eastern District of Louisiana, deposited in the registry of the court the sum of Twenty Thousand Dollars ($20,000.00), being the full penalty of its qualifying bond for the Lumbermen's Reciprocal Association, and called into the said proceeding, as defendants, all Louisiana creditors of the said association, including Etienne Dugas. The jurisdiction of the Federal Court was based on the Federal Interpleader Act of May 8, 1926; *44 Stat. at Large, Chapter 273, p. 416.* The said statute is quoted in the

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that no bond shall be canceled, or withdrawn unless a new bond has been substituted as above provided, or satisfactory evidence has been submitted to the insurance department that the company has discharged all of its obligations and liabilities in this State, and that it has no liabilities whatever outstanding in this State.

Section 2. Be it further enacted, etc., That the requirement of this Act shall not be construed to relieve any insurance company of the several duties now required by law, but the requirement of this Act shall be held to be and are intended to be in addition to the duties and requirements now prescribed by law. Provided that the provisions of this Act shall become effective from and after March 1st, 1909, when present authority of the Companies now in this State will expire."

margin.* An appropriate restraining order was entered and rule was issued requiring the various defendants to show cause why a preliminary injunction should not issue restraining and enjoining them from suing, or taking any steps to sue or doing anything toward the prosecution of any suit or proceeding in any state court or in any other federal court on any claim arising out of or connected with the qualifying bond of February 12, 1930, in question (R. p. 11). Dugas resisted the bill by an exception of no cause of action, plea of estoppel and an answer (R. pp. 19-27). In the plea of estoppel and in the answer he specifically urged the proceeding in the state court, and, more particularly, the taking of an appeal and the furnishing of a suspensive appeal bond as reasons why he should not be

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*An act Authorizing casualty companies, surety companies, insurance companies or associations or fraternal or beneficial societies to file bills of interpleader.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the district courts of the United States shall have original jurisdiction to entertain and determine suits in equity begun by bills of interpleader duly verified, filed by any casualty company, surety company, insurance company or association or fraternal or beneficial society, and averring that one or more persons who are bona fide claimants against such company, association, or society resides or reside within the territorial jurisdiction of said court; that such company, association or society has in its custody or possession money or property of the value of $500 or more, or has issued a bond or a policy of insurance or certificate of membership providing for the payment of $500 or more to the obligee or obligees in such bond or as insurance, indemnity, or benefits to a beneficiary, beneficiaries, or the heirs, next of kin, legal representatives, or assignee

brought into the interpleader proceeding. A preliminary injunction was issued as prayed for on June 25, 1931 (R. p. 31). On June 15, 1932, there was a final hearing as to the rights, duties and obligations of the American, and on September 19, 1932, there was a final decree perpetuating the injunction and holding that the American had complied with all of its obligations under or on account of its qualifying bond and releasing and discharging it from any and all further liability on account of said bond (R. p. 32). The decree then referred the matter to a special master to determine the manner in which the balance of the fund remaining on deposit in the registry of the court should be distributed to the defendants. The special master filed a

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of the person insured or member; that two or more adverse claimants, citizens of different States, are claiming to be entitled to such money or property or the penalty of such bond, or to such insurance, indemnity, or benefits; that such company, association, or society has deposited such money or property or has paid the amount of such bond or policy into the registry of the court, there to abide the judgment of the court.

Sec. 2. In all such cases if the policy or certificate is drawn payable to the estate of the insured and has not been assigned in accordance with the terms of the policy or certificate the district court of the district of the residence of the personal representative of the insured shall have jurisdiction of such suit. In case the policy or certificate has been assigned during the life of the insured in accordance with the terms of the policy or certificate, the district court of the district of the residence of the assignee or of his personal representative shall have jurisdiction. In case the policy or certificate is drawn payable to a beneficary or beneficiaries and there has been no such assignment as aforesaid the jurisdiction shall be in the district court of the district in which the beneficiary or beneficiaries

report on April 17, 1933 (R. p. 33). He found the total amount due Dugas to be the sum of $4160.68, but, the claims proved being almost four times the fund available for distribution, the exact *pro rata* share due Dugas was, according to the report, $1141.29. On April 20, 1933, counsel for all claimants, including counsel for Dugas, filed a stipulation acquiescing in the special master's report and waiving the twenty day delay accorded them by Equity Rule No. 66 for the filing of exceptions to the said report, and, on such stipulation, had the District Judge confirm the said report (R. p. 37). No appeal was taken by Dugas from the decree of September 19, 1932, or from the distributive decree of April 30th, 1933.

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or their personal representatives reside. In case there are claimants of such money or property, or in case there are beneficiaries under any such bond or policy resident in more districts than one, then jurisdiction shall be in the district court in any district in which a beneficiary or the personal representative of a claimant or a deceased claimant or beneficiary resides. Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court on account of such money or property or on such bond or on such policy or certificate of membership until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.

Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further

On March 7th, 1934, Dugas brought a new suit in the Civil District Court for the Parish of Orleans, State of Louisiana, No. 206,399 of the docket of the said court, against the New York Casualty Company, the surety on the appeal bond of the American in the original suit in the Civil District Court, in which new suit he claimed $3019.39, being the difference between the amount found due by the special master in the interpleader suit and the distributive sum therein allowed to Dugas and paid to him (R. p. 39). On March 14, 1934, an amended petition was filed reducing the amount claimed to $2999.00 for the purpose of preventing a removal to the federal court (R. p. 44). To this suit the New York Casualty Company filed various exceptions, among others, one of prematurity (R. p. 46). The

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liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same.

Sec. 4. Public Act numbered 346, Sixty-fourth Congress, entitled "An Act authorizing insurance companies and fraternal beneficiary societies to file bills of interpleader", approved February 22, 1917, and Public Act numbered 465, Sixty-eighth Congress, entitled "An Act to amend an Act entitled 'An Act authorizing insurance companies or associations and fraternal beneficiary societies to file bills of interpleader', approved February 22, 1917", approved February 25, 1925, be and the same are hereby repealed. Said repeal shall not affect any act done or any right, accruing or accrued in any suit or proceeding had or commenced under said Acts hereby repealed, prior to the passage of this Act, but all such acts or rights, suits or proceedings shall continue and be valid and may be prosecuted and enforced in the same manner as if said Acts had not been repealed hereby.

state district court maintained the exception of prematurity and dismissed the suit (R. p. 49). Dugas appealed from that judgment of dismissal to the Supreme Court of the State of Louisiana, which, on January 7, 1935, reversed the judgment of the state district court and remanded the case with an opinion clearly forecasting an unfavorable outcome for the New York Casualty Company. *Dugas v. New York Casualty Company, 181 La. 322,* copied in the Record at p. 56.

On January 29, 1935, the American filed, in the original interpleader proceeding in the United States District Court, a supplemental petition (R. p. 68), in which it averred the happenings above stated since the final decree of September 19, 1932, and set out that if Dugas should be permitted to obtain a judgment in the state court against the New York Casualty Company, the American would, of course, have to reimburse its surety, with the result that Dugas would, in effect, be collecting from the American in the teeth of the decree of the federal district court of September 19, 1932; and, accordingly, in aid of the former decree of the district court, the American asked for an injunction against Dugas specifically restraining him from taking any steps in connection with his suit against the New York Casualty Company, and an injunction against the Civil Sheriff for the Parish of Orleans restraining him from executing any judgment, decree or order that might be entered in the said suit. No restraining order was sought. The matter was heard on application for a

preliminary injunction and such injunction was issued on February 13, 1935 (R. p. 98). Dugas filed various pleadings in opposition to the relief sought, which contained very much the contentions urged by him in opposition to the original interpleader suit (R. pp. 79-98). It being thereafter stipulated that the matter should be submitted for final trial on the record as made up in connection with the application for a preliminary injunction (R. p. 100), a permanent injunction issued on February 25, 1935 (R. p. 101). From such injunction Dugas appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which tribunal, on April 9, 1936, affirmed the judgment of the district court. *Dugas v. American Surety Company of New York, 82 Fed. (2d) 953*, which opinion will be found at page 118 of the record. It is on account of the decree of the Circuit Court of Appeals, affirming the judgment of the District Court of February 25, 1935, that the present application to this Court was made.

In the Circuit Court of Appeals American had filed a motion to dismiss Dugas' appeal because the Civil Sheriff of the Parish of Orleans, against whom the decree of the lower court ran jointly, had not appealed and nothing had been done as to the said Civil Sheriff in the way of summons or severance. The Circuit Court denied the motion to dismiss. From copy of Transcript of Record herein, rereceived by us only on January 8th, 1937, we learn for the first time that copy of motion to dismiss was inadvertently omitted; but that such motion was filed and discussed by the Court in its opinion. We have requested the Clerk of the Circuit Court of Appeals to forward a certified copy of the motion to the Clerk of this Court.

ARGUMENT.

I.

ON MOTION TO DISMISS.

As just hereinabove stated, the American filed a motion in the Circuit Court to dismiss Dugas' appeal, which motion was, by that court, denied. While no cross petition or writ was filed in this court by the American, we understand the practice to be that this court may, nevertheless, consider the motion to dismiss. *Langnes v. Green, 282 U. S. 531, 535-9 (1931); Stelos Company v. Hosiery Motor-Mend Corporation, 295 U. S. 237, 239 (1935); Public Service Commission v. Havemeyer, 296 U. S. 506, 509 (1936).* The propriety of passing on the action of the Circuit Court in denying the motion to dismiss in the present case is accentuated by the fact that the basis of the motion would seem clearly to be jurisdictional.

The decree of the District Court appealed from forbade any action by Dugas toward the prosecution of his suit in the state court against the New York Casualty Company and enjoined the Civil Sheriff for the Parish of Orleans from taking any action toward the carrying out of any decree which might be rendered by the state courts in the said proceeding. Therefore, even if Dugas should succeed in his appeal, the decree of the District Court, long since final, would still remain as against the Civil Sheriff.

In *Masterson v. Herndon, 10 Wallace 416 (1870),* this court announced at pages 416-17:

> "It is the established doctrine of this court that in cases at law, where the judgment is joint, all the

> parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record."

This rule seems first to have been laid down in *Williams v. the President, Directors and Company of the Bank of the United States, 11 Wheaton 414 (1826)*, in which the court spoke through Mr. Chief Justice Marshall. In 1833 the same court, again through the Chief Justice, applied the same rule to a chancery case in *Owings v. Kincannon, 7 Peters 399*. Since that time the current of jurisprudence has proceeded unbroken.

The Heirs of Wilson v. The Life and Fire Ins. Co. of New York, 12 Peters 140, (1838).
Forgay v. Conrad, 6 Howard 201, (1848).
Smyth v. Strader, Pevine & Co., 12 Howard 327, (1851).
Brewster v. Wakefield, 22 Howard 118, (1859).
Clifton v. Sheldon, 23 Howard 481, (1859).
Mussina v. Cavazos, 6 Wallace 355, (1867).
"The Protector", 11 Wallace 82, (1870).
Hampton v. Rouse, 13 Wallace 187, (1871).
Simpson v. Greeley, 20 Wallace 152, (1873).
Fiebelman v. Packard, 108 U. S. 14, (1882).
Hanrick v. Patrick, 119 U. S. 156, (1886).
Estis v. Trabue, 128 U. S. 225, (1888).
Mason v. United States, 136 U. S. 581, (1890).
Dolan v. Jennings, 139 U. S. 385, (1891).

Hardee v. Wilson, 146 U. S. 179, (1892).
Inglehart v. Stansbury, 151 U. S. 68, (1894).
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Sipperley v. Smith, 155 U. S. 86, (1894).
Beardsley v. Arkansas & Louisiana Ry. Co., 158 U. S. 123, (1895).
Gilfillan v. McKee, 159 U. S. 303, (1895).
Wilson v. Kiesel, 164 U. S. 248, (1896).
Garcia v. Vela, 216 U. S. 598, (1910).
Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169 (1932).

There have been cases which were held not to fall within the rule. For example, in *Elliot v. Lombard, 292 U. S. 139 (1934)*, it was held that, since the decree was not a joint one, but indeed ran primarily against only the main defendant and secondarily, or conditionally, against the other defendant, whose absence from the appeal was the basis of the motion to dismiss, the main defendant could appeal alone. It will be observed that in the instant case the judgment ran equally against Dugas and the Civil Sheriff, and that here there was a definite final decree against the Civil Sheriff, whereas in *Elliot v. Lombard* the decree against the secondary defendant was only contingent.

Much the same thing was true of *Todd v. Daniel, 16 Peters, 521 (1842).*

Winters v. United States, 207 U. S. 564 (1908) is readily distinguishable, for there the contention was that certain defendants, against whom a decree *pro confesso* had been taken, were necessary parties to an appeal. The

controversy was as to various pieces of property, right or title to which was claimed by different defendants; and the court considered that there was no common interest so as to make the decree in truth a joint one.

The facts of *Basket v. Hassell, 107 U. S. 602 (1882)* appear so different from the facts in the present case as to make it inapplicable.

City Bank v. Hunter, 129 U. S. 557 (1889) clearly involved a decree that was in no sense joint.

In *Amadeo v. Northern Assurance Company, 201 U. S. 194 (1906)*, it was held that a motion to dismiss should not prevail where the omitted parties were shown to have assigned all their right, title and interest in the controversy and thus to have no possible concern with its outcome.

While here the Civil Sheriff has no pecuniary interest in the outcome of this litigation, the fact is that it is only through him that any decree in the state court, in favor of Dugas, could be enforced, and there is a final judgment forbidding the said Civil Sheriff from taking action to enforce any decree that might be rendered in the state courts in favor of Dugas. We are by no means sure that if the injunction issued by the District Court had run against the Civil Sheriff only, it would not have been just as effectual in affording protection to American.

We believe that the motion to dismiss the appeal was good and that this court should dispose of the controversy by so holding.

II.

ON THE MERITS.

Petitioner has filed, in connection with his petition in this court, six separate specifications of error, and these we shall now deal with, in order; but we fear that it will be very difficult to make a complete separate argument on each point without great repetition.

Specification of Error Number One.

This specification denies that the supplemental proceedings in the interpleader suit were ancillary to the original interpleader suit.

The sole and only basis on which Dugas filed suit in the Civil District Court for the Parish of Orleans against the American and obtained judgment therein against it, was the obligation of the said surety company embodied in its qualifying bond given for account of the Lumbermen's Reciprocal Association. The limit of that bond being Twenty Thousand Dollars ($20,000.00), the American filed its interpleader suit in the United States District Court for the Eastern District of Louisiana. That suit had for its sole and only purpose the holding of the American's liability on account of its said qualifying bond down to the amount of the penalty thereof, or $20,000.00. As to the claim of Dugas, it expressly set forth, in Article 5 of the said petition, the facts as to Dugas' having obtained a judgment against it and its having appealed therefrom to the Court of Appeal for the Parish of Orleans. Consequently, in so far as Dugas was concerned, that judgment and that appeal were definitely involved in the suit. The

plea of estoppel filed by Dugas in the said interpleader suit, in which he asked that the bill of interpleader be dismissed as to him, explicitly set up the judgment obtained by him in the state court, the appeal therefrom by the American and the giving, in connection with such appeal, of the appeal bond signed by the New York Casualty Company as surety. Dugas even attached a copy of the said appeal bond to his said plea of estoppel. His answer in the interpleader suit reaverred the facts as to the judgment of the Civil District Court for the Parish of Orleans, the appeal by the American and the furnishing of the appeal bond, copy of which was likewise attached to the said answer as a part thereof. The very purpose of Dugas' answer was to avoid being injected into the interpleader suit. It thus appears that, as to Dugas, the issue presented in the interpleader suit was whether or not the fact that he had obtained a judgment in the state court, from which the American had appealed and furnished a surety bond in connection with such appeal, precluded the American from impleading him in the interpleader suit. The decree of September 19th, 1932, in said interpleader suit, distinctly resolved those issues in favor of the American and against Dugas. That decree is final and no appeal therefrom was attempted by Dugas or anyone else. Furthermore, we submit that Dugas, in effect, acquiesced in the decree when he stipulated that the subsequent distributional report of the special master should immediately be confirmed by the court without waiting the usual twenty day delay.

The clear purpose of the interpleader suit and the clear effect of the decree therein was to hold that, by the payment into the registry of the federal district court of

the full amount of the qualifying bond, the American had discharged its full duty to all of the defendants in the said interpleader suit, of whom Dugas was one; and the purpose and effect of the injunction was to prevent the defendants, including Dugas, from instituting or prosecuting in any state court, or in any other federal court, any suit or claim against the American growing out of or based on its said qualifying bond. We submit that the decree was intended to give and did give the American a full discharge and acquittance, in so far as concerned Dugas' suit against it in the state court; and the injunctive part of the decree was intended to prevent and did prevent Dugas from taking any steps to prosecute or attempt to prosecute the said suit.

To say that Dugas could, by indirection, proceed against the New York Casualty Company, the surety on the appeal bond of the American, while conceding that he could not proceed against the American, would be to defeat the very purpose of the decree of the Federal Court.

The United States District Court for the Eastern District of Louisiana acquired and exercised jurisdiction of this controversy in connection with the interpleader suit. The decree therein of September 19, 1932, upholding that jurisdiction as to all parties, including Dugas, and resolving the issues presented by Dugas and the other parties thereto, is not before this court for review and is beyond any question a final judgment binding on all parties thereto. Any consideration or discussion of the matter must be with full realization of this fact as a premise.

The necessary effect of the suit subsequently brought in the State Court by Dugas against the New York Casualty Company as surety on the appeal bond of the American was to deal with the subject matter of what had already been adjudicated by the federal court and was covered by the outstanding permanent injunction of that tribunal. If, therefore, there was any doubt or uncertainty as to the interpretation or effectiveness of the relief granted by the federal court, it was within the power of that court to effectuate its previous decree by entering any additional decree necessary to protect its jurisdiction and to carry out the underlying purpose of the decree.

In discussing the question of a supplemental bill in aid of a former decree, this court said, in *Root v. Woolworth, 150 U. S. 401 (1893)*, beginning at page 410:

> "If the bill in the present case could be properly considered as an ejectment bill, the objection taken thereto by the defendant would be fatal to the proceeding; but instead of being a bill of this character it is clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain. Shields v. Thomas, 18 How. 253, 262; Thompson v. Maxwell, 95 U. S. 391, 399; Story's Eq. Plead., Sections 335, 338, 339, 429.
>
> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading (9th ed.), Sec. 338:
>
> > 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it

> may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or to bring forward parties before the court, or it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court.'

"Under this principle Morton could undoubtedly have brought the bill to carry into effect the decree rendered in his favor against Root, and it is equally clear that his assignee, or privy in estate has a right to the same relief that Morton could have asserted. On this subject it is stated in Story's Equity Pleading, Section 429: 'Sometimes such a bill is exhibited by a person who was not a party, or who does not claim under any party to the original decree; but who claims in a similar interest, or who is unable to entertain the determination of his own rights, till the decree is carried into execution. Or it may be brought by or against any person claiming as assignee of a party to the decree.' The appellee in the present case occupies that position, and he should not, any more than Morton, to whose rights he has succeeded, be put to the necessity of instituting an original or independent suit against Root, and relitigate the same questions which were involved in the former proceeding.

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties,

is well settled. Story's Eq. Jur. Sec. 959; Kershaw v. Thompson, 4 Johns. Ch. 609, 612; Schenck v. Conover, 13 N. J. Eq. (2 Beasley) 220; Buffum's case, 13 N. H. 14; Shepherd v. Towgood, Tur. & Rus. 379; Davis v. Bluck, 6 Beav. 393. In Kershaw v. Thompson, the authorities are fully reviewed by Chancellor Kent, and need not be reexamined here."

In the earlier case of *Thompson v. Maxwell, 95 U. S. 391, (1877)*, we find, beginning at page 399:

"Tested, therefore, by any law of procedure which may be invoked in its support, the bill in this case, considered as a bill of review, seeking to reverse, modify, and reconstruct the decree of September, 1866, cannot be sustained. Nevertheless, the general purpose which it evidently had in view—the quieting of the title to the land in question—is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. And if, instead of seeking to reverse the decree of September, 1866 (which, for like reasons of public policy, as applicable to the security of judgments that have passed into rem adjudicatam, is not allowable), the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view. Bills for the purpose named are well known in equity proceedings. Lord Redesdale says:

'Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court. This happens, generally, in cases where parties having neglected to proceed upon the decree, their rights under it become so embarrased by a variety of subsequent events that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party to the original

decree, but claims a similar interest, or is unable to obtain the determination of his own right till the decree is carried into execution. Or it may be brought by or against a person claiming as assignee of a party to the decree. The court in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered the directions and varied them in case of mistake; and it has even on circumstances refused to enforce the decree; though in other cases the court, and the House of Lords upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution.' Redesdale's Treatise, 95, 96.

"It seems to us that the remedy here described by such high authority is applicable to the case at bar. The decree of September, 1866, has never been carried into effect by any act done since it was made. It directed that Maxwell should pay the money stipulated for by the compromise, and that the defendant should execute deeds of conveyance. But the parties seem to have assumed that their previous acts performed in May, 1866, were a sufficient compliance with the directions of the decree. Yet the decree does not take notice of this fact.

"Now, in order to execute this decree, or to determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it was perfectly competent for the parties to file a bill conceived and constructed to that end. The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. The proofs show a case which, in our judgment, supports the conclusions of the de-

> cree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf. But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obligated to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again."

Wilson v. Alexander, 276 Fed. 875 (1921), a decision of the Circuit Court of Appeals for the Fifth Circuit, grew out of a bill filed in the federal court in Texas assailing the validity of a certain bond issue and making all parties at interest defendants. Wilson, the holder of the bonds, filed a cross bill seeking a foreclosure under the deed of trust. At such foreclosure the property was bought in by Wilson. Some seven years later Alexander, who had pledged the bonds to Wilson, brought a suit in the state courts in Texas to obtain possession of the property, Alexander having been a party to the original suit in the federal court. What then happened was set out as follows at page 878 of the opinion:

> "Wilson thereupon filed, in the United States District Court for the Northern District of Texas, a bill, styled a supplemental cross-bill and bill of revivor, entitled in the said cause of McCornick & Co., Bankers, v. Texas Loan & Trust Company, et al., reciting the former proceedings in said cause and the decree entered therein, alleging that by said decree it was adjudged that Alexander was fore-

closed from asserting any ownership of, claim to, or interest in said property, or any part thereof, and that the deed made to said Wilson by the Texas Loan & Trust Company was in satisfaction of said decree in said cause. He prayed an injunction against the prosecution of so much of said state court suit as attempted to disregard or overthrow the decree in said cause above recited, and that said decree be construed and enforced, so as to forever bar Alexander from in any wise asserting any ownership of, claim to, or interest in said property, or any part thereof, or from asserting in said state court, or otherwise, that he has any claim thereto."

The district court granted, only to a limited extent, the relief sought by the bill. The Circuit Court of Appeals affirmed the judgment, in so far as it upheld the bill and reversed it in so far as it failed to uphold it, stating at pages 879-880:

"If it be true that the proceeding filed by Alexander in the state court attacks, in a substantial respect, the effect of the decree rendered in the United States court on June 7, 1912, there can be no doubt of the jurisdiction of the United States court to entertain proceedings to construe and give full effect to its decree, and to protect one holding under a deed made in accordance therewith. A case of such a character is not affected by Judicial Code, Sec. 265 (Rev. St. Sec. 720), prohibiting the enjoining by a United States court of a proceeding in a state court except under a law relating to proceedings in bankruptcy. In such case the United States court is protecting its previously acquired jurisdiction, which has resulted in a decree giving rights which are attacked by subsequent proceedings brought in a state court.

"A striking illustration of this is afforded by the case of Gunter, Attorney General, etc., v. Atlantic Coast Line, 200 U. S. 273, 26 Sup. Ct. 252, 50 L.

> Ed. 477. In a former suit, brought by parties in privity with the Atlantic Coast Line Railway, a decree was rendered adjudging that a railroad had a contract with the state exempting it from certain taxation. The state had become a party to said suit. For at least 25 years thereafter no further attempt was made to tax the property so declared exempt. Thereafter another attempt was made, and suits to collect such taxes were instituted in the state courts. Thereupon the defendant in said state court suits began proceedings in the United States circuit court for the District of South Carolina, filing a bill as ancillary to the former case, terminated for more than 25 years, setting up that the decree therein was res judicata as to the existence of the tax exemption, that the suits in the state courts sought to relitigate said question, and prayed an injunction. After holding that the state of South Carolina was a party to the original suit in the United States court, the court held an injunction would properly issue to enjoin the further progress of the suits in the state courts, and that in such a case section 720 of the Revised Statutes did not apply. Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. Ed. 477."

As to any suggestion that the supplemental bill herein should have been denied because not filed at the same term of court within which the original interpleader decree was entered, we cite *McCutchen v. Union Trust Company, 271 Fed. 586 (1921)* (writ denied, *256 U. S. 699*), decided by the Circuit Court of Appeals for the Eighth Circuit, in which the court said at page 593:

> "The fact that the terms of court at which the foreclosure decree and the order for the receivers' sale were entered had expired is not important. The decision of the state courts, giving to the order an effect not contemplated when it was made, and in-

volving also the foreclosure decree according to Hardin's contention, occurred subsequently. It was proper to bring the subsequent situation so created to the attention of the court below by supplemental bill."

Following a federal court decision in a certain matter, two suits were brought in the state courts and two in the federal courts seeking to relitigate certain points involving the subject matter of a previously decided suit in the federal court. Thereupon, a supplemental bill was filed to enjoin the plaintiffs in these new suits. In this matter, *Sterling v. Gredig, 5 Fed. Supp. 329*, the relief sought was granted. The following language was used at page 332:

"Complainants seek, in this suit, to enforce and effectuate the decree. They allege that respondents, by the prosecution of the pending suits, are seeking to render the decree void and ineffectual, and to unsettle and annul what has been there settled. And that the filing and prosecution of said suits have, and will continue to have, the effect of clouding the title of the trustees and the city to the properties; of embarrassing, hindering, delaying and impeding them in the proper administration thereof; and that said suits are vexing and harassing to complainants, and are subjecting them, and will continue to subject them, to the necessity of expending considerable sums of money in the payment of costs, expenses and attorneys' fees in and about the defense of said suits; will compel complainants to submit to a multiplicity of suits to therein relitigate what has already been litigated, adjudicated, and settled in their favor by such decree, and that complainants are being deprived, and will be deprived, of the practical benefit and value of the decree in their favor, and deprived of the protection and enforcement of the right, title, and interest acquired by such decree.

"These allegations I find to be true.

"It follows that complainants are entitled to the relief asked."

In *Local Loan Company v. Hunt, 292 U. S. 234 (1934)*, Hunt borrowed Three Hundred Dollars from the Loan Company, and, as security, executed an assignment of wages to be earned. Later Hunt filed a voluntary petition in bankruptcy, was adjudged a bankrupt and order was entered discharging him from all provable debts and claims. Thereafter, the Loan Company brought suit in the state courts against Hunt's employer to enforce the assignment in regard to wages earned after adjudication. Thereupon Hunt went into the bankruptcy court and asked that the Loan Company be enjoined from prosecuting or attempting to enforce its claim under the wage assignment. The bankruptcy court entered a decree as sought. In affirming it, this court said at page 239:

"The pleading by which respondent invoked the jurisdiction of the bankruptcy court in the present case is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. Root v. Woolworth, 150 U. S. 401, 410-412; Julian v. Central Trust Co., 193 U. S. 93, 112-114; Riverdale Mills v. Manufacturing Co., 198 U. S. 188, 194 et seq.; Freeman v. Howe, 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one.

The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Sec. 265 of the Judicial Code (R. S. Sec. 720), U. S. C., Title 28, Sec. 379. Julian v. Central Trust Co., supra, 112; Dietzsch v. Huidekoper, 103 U. S. 494, 497; Root v. Woolworth, supra, 413; M'Donald v. Seligman, 81 Fed. 753; St. Louis, I. M. & S. Ry. Co. v. Bellamy, 211 Fed. 172, 175-177; Brun v. Mann, 151 Fed. 145, 150."

Other decisions which support our contentions are:

Shields v. Thomas, 18 Howard, 253 (1855);

Healey Ice Machine Company v. Green, 184 Fed. 515 (CC. N. C. 1911);

Osage Oil & Refining Co. v. Continental Oil Co., 34 Fed. (2) 585 (C. C. A. 10, 1929);

Ross v. Miller, 252 Fed. 697 (C. C. A. 4, 1918);

McCabe v. Guaranty Trust Company, 243 Fed. 845 (C. C. A. 2, 1917);

Lamb v. Cramer, 285 U. S. 217 (1932);

Lamb v. Schmitt, 285 U. S. 222 (1932);

Sand Springs Home v. Title Guarantee & Trust Co., 16 Fed. (2d) 917 (C. C. A. 8, 1926);

Baush Machine Tool Company v. Aluminum Company of America, 63 Fed. (2d) 778 (C. C. A. 2, 1933);

Hickey v. Johnson, 9 Fed. (2d) 498 (C. C. A. 8, 1925).

The propriety of a supplemental bill in aid of a previous judgment, such as herein filed, is well recognized by the text writers. *Story's Equity Pleadings, Ninth Edition, Chapter 8, pages 292, et seq.*, deals with this subject

and we find in *Section 336*, beginning at page 299, the following:

> "In the next place, when new events or new matters have occurred since the filing of the bill, a supplemental bill is, in many cases, the proper mode of bringing them before the court; for, generally, such facts cannot be introduced by way of amendment to the bill. But, here, we are to understand, that such new events, or new matters, do not change the rights or interests of the parties before the court (for then, properly speaking, the bill is not simply a supplemental bill), but they merely refer to and support the rights and interests already in the bill. A supplemental bill may also be brought, not only to insist upon the relief already prayed for in the original bill; but upon other relief different from that which was prayed for by the original bill, where facts which have since occurred may require it. Thus, if pending a bill to restrain proceedings at law upon a bill of exchange, the holder should obtain a judgment in the suit at law, the plaintiff in equity may file a supplemental bill, stating the facts, and praying for repayment and an indemnity."

2 Hughes Federal Practice, Section 1226, page 394, reads:

> "The function of a supplemental bill in aid of a decree is merely to give fuller effect, or carry out that decree, and not to obtain relief of a different kind on a different principle. As assignee, or privy in estate, has the same right to relief as the one in whose favor the decree was made. A federal court, having entered a decree removing a cloud from the title to a parcel of real estate and declaring the title vested in A in interest and estate, has jurisdiction of a supplemental and ancillary bill brought by A's successor to carry that decree into effect."

See also *Cyclopedia of Federal Procedure, Vol. 4, Section 1157, pages 336, et seq.*

It seems to us that what we did was very much along the lines contemplated by *Equity Rules 34 and 35*, which read as follows:

> "Rule 34—SUPPLEMENTAL PLEADING.—Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."
>
> "Rule 35. BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."

For the foregoing reasons, we believe that the Circuit Court of Appeals and the District Court were right in holding that the supplemental proceedings herein were ancillary to the original interpleader suit and were within the jurisdiction of the District Court.

Specification of Error Number Two.

This assignment raises the contention that the right established in favor of the American by the original interpleader decree was not inconsistent with Dugas' right to enforce, against the New York Casualty Company as surety on the state court of appeal bond, his judgment against the American on his claim for workman's compensation.

We repeat that the only basis of any claim which Dugas could assert against the American was the obligation embodied in its qualifying bond. It was that very obligation which was sought to be determined and was determined by the United States District Court in its decree in the interpleader suit; also, is it clear that said decree was entered in the face of Dugas' contention that his having obtained a prior judgment in the state court and the American having appealed therefrom, prevented his being impleaded in the Federal Court. The Federal Court, by its decree, concluded that the American had discharged any and all obligations due under its qualifying bond. That qualifying bond was the sole basis of the judgment in the state court which was, therefore, satisfied. To permit a recovery against the surety on the appeal bond would defeat the very purpose of the decree in the interpleader suit, as it would necessarily mean that the American would have to reimburse its surety, and, thus, in a left-handed way, be forced to pay out more than the amount of its qualifying bond.

The Louisiana Civil Code expressly provides that the surety who pays the debt of his principal is entitled to reimbursement from him. *Article 3052 of the Louisiana Civil Code* reads:

> "Recourse of Surety Against Principal Debtor. The surety who has paid the debt, has his remedy against the principal debtor, whether the surety has been given with or without the knowledge of the debtor.
>
> "This remedy takes place both for the principal and interest, and for the costs which the surety may have been sentenced to pay; but with regard to the costs, the remedy of the surety begins only from the

> day he has given notice to the principal debtor, that a suit was commenced against him."

Article 3053 provides:

> "Subrogation of Surety. With regard to that remedy, the surety has the same right of action and the same privilege of subrogation, which the law grants to codebtors in solido."

The reference in the article last quoted to the rights of codebtors *in solido* is to *Article 2161*, which, in so far as relevant, provides:

> "Subrogation takes place of right * * * for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it."

Two, among many, Louisiana decisions recognizing the right thus given to the surety against his principal are *Brown v. Staples, 138 La. 602, 608 (1915)*, and *Martel v. Rovira, 164 La. 1099, 1102-3 (1928)*. As a matter of fact, the same rule has been generally recognized: *Aetna Life Insurance Company v. Middleport, 124 U. S. 534 (1888); Henningsen v. United States Fidelity and Guaranty Company, 208 U. S. 404 (1908)*. The *Aetna* case is particularly appropriate, in so far as the subrogation feature is concerned, because of the statement in it that the doctrine of subrogation is derived from the civil law and that, therefore, the Louisiana cases are especially applicable.

Specification of Error Number Three.

This assignment reads:

> "That the said Circuit Court of Appeals erred in holding that the appeal bond was an incident of the suit brought by petitioner against respondent for

the full amount of his claim and was a means of effecting the enforcement of that claim."

When Dugas obtained a judgment against the American in the State Court and the American elected to appeal from such judgment, it was necessary under the law of Louisiana to furnish an appeal bond. We do not see how it can be said that the bond so given was not an incident of the suit in the State Court. The purpose of the bond was to guarantee to Dugas the appellee, that, if successful in the appellate court, he would collect his judgment. However, the surety agreed to be liable only in the event the appellant did not respond; and since it has been determined that the appellant has in the interpleader proceedings in the federal court discharged its full duty to Dugas it must logically follow that the surety on the appeal bond given in the State Court has no further liability. When an unsuccessful litigant seeks a review by an appellate court of the judgment of the trial court, the appeal bond he gives is the price he must pay for preventing the judgment creditor from executing pending determination of the appeal (in the case, as here, of an appeal with stay) and getting the review. The appeal bond is in no sense a separate or independent undertaking, but merely an incident in the suit.

Specification of Error Number Four.

This assignment complains of the action of the Circuit Court in holding that the liability under the appeal bond was a liability on account of the qualifying bond, and that it came within the scope of the decree discharging respondent from all liability on the qualifying bond.

Considering that the sole basis of Dugas' judgment in the state court against the American was the qualifying bond of the American, it seems not unnatural to recognize that fact. What seems to be running through counsel's mind is the idea that once a judgment was obtained in the state court against the American, the claim under the qualifying bond passed out of the picture. It must not, however, be overlooked, that if this was true, Dugas had no right to any recovery in the interpleader suit, which certainly related only to the qualifying bond. Clearly, the District Court in its decree in the interpleader suit denied this very contention of Dugas and held that the judgment he had obtained in the state court was cognizable in the interpleader suit. In this connection it is not to be overlooked that the giving, by the American, of an appeal bond in the state courts was strongly stressed in the interpleader suit, and that any contentions by Dugas in regard thereto were denied. The present matter does not grow out of an appeal from the original decree in the interpleader suit. That decree is final and cannot now be reviewed. The question is whether, in spite of the finality of that decree, its purpose is to be defeated by a subsequent suit in the state court against the surety on the appeal bond of the American. The District Court held that, in order to protect the enforcement of its original decree in the interpleader suit, it was warranted in enjoining Dugas from frittering away that decree by attempting to hold the surety on the appeal bond. The Circuit Court of Appeals was, most assuredly, correct in upholding the action of the District Court in this regard.

Specification of Error Number Five.

This assignment challenges the holding of the Circuit Court of Appeals, that the proceeding against the surety on the appeal bond, was an indirect method of proceeding against the American on its qualifying bond.

Indubitably, the sole basis of liability asserted against the American was the statutory qualifying bond executed by it, and that liability was, therefore, the foundation of the judgment of the state court against the American in connection with the appeal from which the appeal bond of the New York Casualty Company was given. If, therefore, the New York Casualty Company, the surety on the said appeal bond, be made to pay Dugas, the New York Casualty Company will look to the American for protection, and, so the American will have to reimburse the New York Casualty Company. If this is not an indirect method of proceeding, by Dugas, against the American, it is difficult to know what would be. It would be a doing, by indirection, of the very thing that the original injunctive decree of the Federal District Court in the interpleader suit was intended to prevent.

Specification of Error Number Six.

This assignment raises the point that the Circuit Court of Appeals erred in holding that the decree of the district court did not go beyond giving due effect to the final decree in the interpleader suit.

The underlying proposition has, necessarily, already been argued in connection with discussion of the other assignments and we shall, therefore, deal with it very briefiy.

The purpose and effect of the decree of the district court of September 19, 1932, was to recognize the fact that the American had discharged its full duty in connection with its qualifying bond and to enjoin the various defendants, including Dugas, from taking any other action to realize on any claim against that bond. Obviously, the judgment which Dugas had in the state court against the American grew out of and was based solely on the said qualifying bond. To permit Dugas to enforce the said judgment, by proceeding against the New York Casualty Company, the surety on the appeal bond, while conceding that he cannot proceed against the American, would be an indirect method of holding the American, for the simple reason that the New York Casualty Company would have an absolute right to reimbursement by the American. Besides, to permit a recovery against the New York Casualty Company would, we submit, be against equity and good conscience and would, most assuredly, be to set at naught the underlying purpose of the decree of the Federal District Court of September 19, 1932.

CONCLUSION.

Stripped of immaterial details, the bare contention of the petitioner herein is that he should be allowed to collect from the New York Casualty Company his claim against the American, concededly based solely on the qualifying bond given by it for account of the Lumbermen's Reciprocal Association, which said claim was recognized by the judgment of the Civil District Court for the Parish of Orleans, from which judgment the American appealed to the Court of Appeal for the Parish of Orleans, and fur-

nished an appeal bond signed by the New York Casualty Company, as surety. This contention loses sight of the fact that, after the taking of the said appeal, the American deposited the full amount of its said qualifying bond in the registry of the United States District Court for the Eastern District of Louisiana and interpleaded the various claimants against the said bond, including Dugas, who vigorously resisted the attempt to interplead him on account of the judgment which he had already obtained in the state courts and the appeal bond therein given by the American. The United States District Court held that Dugas was properly interpleaded and adjudicated on his claim against the American growing out of its said qualifying bond, definitely holding that the American had, in the interpleader proceedings, completely discharged its full liability to the various claimants, including Dugas, and enjoined them from taking any steps to assert or prosecute their claims elsewhere against the American. If Dugas was dissatisfied with the judgment of the Federal Court of September 19th, 1932, he had the right to appeal therefrom. Not only was no such appeal taken, but, by stipulating that the later distributive decree of April 20, 1933, should be entered without the usual delays, Dugas acquiesced in the decision of the Federal Court which was, of course, adverse to his contentions. There being no further claim on the part of Dugas against the American, he should not be allowed to assert a claim against the surety on the appeal bond of the American in the State Court, which appeal bond was but an incident to his main claim against the American, which was satisfied and discharged by the interpleader proceedings in the Federal Court. Therefore, the Federal District Court was

right in enjoining Dugas from attempting to collect from the New York Casualty Company and the Circuit Court of Appeals was right, on the merits, in affirming that judgment.

In conclusion, we ask that the case be remanded to the Circuit Court with instructions to dismiss the appeal, and in the alternative we submit the judgment should be affirmed.

Respectfully submitted,

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